

Symposium Foreword

The History and Future of Election Law: Improving Democracy Through Knowing Its Evolution

EDWARD B. FOLEY*

This address was given in Saxbe Auditorium at the Michael E. Moritz College of Law on November 20, 2015 as the opening to the Ohio State Law Journal Symposium on The History and Future of Election Law. It has been adapted for publication.

TABLE OF CONTENTS

I.	INTRODUCTION	683
II.	“FAULTY” CONSTITUTIONAL PROCEDURE	684
III.	FRANCE’S ELECTORAL SYSTEM	686
IV.	CONCLUSION.....	687

I. INTRODUCTION

I welcome you to this Symposium on The History and Future of Election Law here at the Moritz College of Law. Now before we get underway, I want to express a few words of gratitude. First, to the *Ohio State Law Journal*, for being the primary sponsor of this Symposium, and particularly to Amanda Grandjean, the Symposium Editor, and Andrew Mikac, the Editor in Chief. Anyone who knows Amanda knows her boundless energy and enthusiasm, and she has put her entire heart and soul into preparing for today.

I also want to thank Steve Huefner, who is taking the lead with our new interdisciplinary Democracy Studies initiative, which has provided considerable support for this Symposium. Steve has been involved with Amanda and Andrew in planning for today every step of the way. And also Daphne Meimaridis, Program Administrator of *Election Law @ Moritz*, who has been assisting Steve with the administration of the new Democracy Studies initiative and has been applying her usual superb professionalism to this exciting new endeavor. Matt Borden, our Democracy Studies Fellow, has also been of great help to Steve. So we must thank all of these folks.

* Charles W. Ebersold and Florence Whitcomb Ebersold Chair in Constitutional Law at the Ohio State University Moritz College of Law and Director of *Election Law @ Moritz*.

II. "FAULTY" CONSTITUTIONAL PROCEDURE

Let me open our conversation today with an anecdote about James Madison. In 1823, he acknowledged to a correspondent that the Constitutional Convention of 1787 had been too hasty in its treatment of the method for electing the President, and as a result, had adopted a "faulty" procedure.¹ "Faulty" was Madison's own word.² This issue of how to elect the President, Madison wrote, "took place in the latter stage of the Session" and "was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such Bodies."³ That's a clear confession of error.

In the same letter, Madison sketched his own proposed constitutional amendment to fix the defects he saw.⁴ What is important now is not the details of Madison's proposal, but that he thought a constitutional amendment was necessary even after the Twelfth Amendment had been adopted two decades earlier, supposedly to solve the problem caused by the sloppiness of the Framers back in Philadelphia.⁵ But in 1823, Madison did not think that the Twelfth Amendment was enough.⁶ Anticipating exactly what would occur the following year, in the election of 1824, Madison did not think the Constitution had an adequate mechanism for dealing with the situation in which the nation was having difficulty choosing among more than two candidates.⁷ If you recall from your high school history class, 1824 involved a four-way split between Andrew Jackson, John Quincy Adams, Henry Clay, and a guy we have all forgotten about, William Crawford from Georgia, who was Secretary of the Treasury.⁸ Because none of the four received a majority of electoral votes, the election was thrown to the House of Representatives,⁹ but the Twelfth Amendment specified a one-state, one-vote procedure in the House, requiring that each state's delegation share a single vote.¹⁰ It was this one-state, one-vote aspect of the Twelfth Amendment, which also had been part of the original Constitution,¹¹ which Madison especially objected to.¹² This provision,

¹Letter from James Madison to George Hay (Aug. 23, 1823), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 556–57 (Philip B. Kurland & Ralph Lerner eds., 1987).

²*Id.* at 557.

³*Id.* at 556.

⁴*Id.* at 557.

⁵*See id.* at 556–57; *see also* U.S. CONST. amend. 12.

⁶*See generally* Letter from James Madison to George Hay, *supra* note 1.

⁷*See generally id.*

⁸*Tally of the 1824 Electoral College Vote*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/electoral-tally> [<https://perma.cc/NH9X-QTD2>] (last updated Oct. 3, 2016).

⁹*See generally* DONALD RATCLIFFE, THE ONE-PARTY PRESIDENTIAL CONTEST: ADAMS, JACKSON, AND 1824'S FIVE-HORSE RACE (2015).

¹⁰U.S. CONST. amend. 12.

¹¹*See* U.S. CONST. art. II, § 1.

¹²*Why James Madison Wanted to Change the Way We Vote for President*, FAIRVOTE (June 18, 2012), <http://www.fairvote.org/why-james-madison-wanted-to-change-the-way->

Madison wrote, “is so great a departure from the Republican principle of numerical equality . . . and is so pregnant also with a mischievous tendency in practice, that an amendment of the Constitution on this point is justly called for by all its considerate [and] best friends.”¹³ The nation should have heeded Madison’s warning then, and we should still heed it now.

Sure, we have not had an election thrown to the House since 1824,¹⁴ but this faulty provision still lurks in the background, potentially to be invoked if for some reason no candidate gets an Electoral College majority. More important, it is symbolic of the larger problem that concerned Madison—that greatly affected subsequent history and that remains with us today—the problem that the nation still lacks an adequate method to settle on a final choice when more than two candidates command significant interest among voters.

The most vivid example of this deficiency is the election of 1912, when Teddy Roosevelt’s split from the Republicans caused a three-way race that enabled Woodrow Wilson to win,¹⁵ when there is little doubt that if there had been a runoff between Roosevelt and Wilson, Roosevelt would have prevailed with the votes from William Howard Taft’s supporters.¹⁶ Taft, as all Ohioans know, was the incumbent President, who had disappointed Roosevelt after Roosevelt had already picked Taft to be his successor.¹⁷ Taft finished third, behind Wilson and Roosevelt;¹⁸ but if Taft had no longer been in the running, Roosevelt undoubtedly would have finished first.¹⁹ Who knows what would have happened if Roosevelt, rather than Wilson, had occupied the White House when World War I broke out in Europe in 1914? Some historians are willing to speculate that Roosevelt would have gotten the United States involved much sooner than Wilson did,²⁰ would not have been the naïve supporter of the failed League of Nations that Wilson was,²¹ and perhaps would have laid the foundations for a different sort of post-war settlement in

we-vote-for-president [<https://perma.cc/VQS3-E7Z5>] (advocating for electing the President through a national popular vote).

¹³ Letter from James Madison to George Hay, *supra* note 1, at 557.

¹⁴ See generally RATCLIFFE, *supra* note 9.

¹⁵ See Kent Garber, *Three-Way Race of 1912 Had It All*, U.S. NEWS & WORLD REP., Jan. 28–Feb. 4, 2008, at 43, 43–44.

¹⁶ Edward B. Foley, *Third Party and Independent Presidential Candidates: The Need for a Runoff Mechanism*, 85 FORDHAM L. REV. (forthcoming 2016) (manuscript at 11), <https://ssrn.com/abstract=2795124> [<https://perma.cc/CG65-HHQZ>].

¹⁷ Garber, *supra* note 15, at 43.

¹⁸ *Id.* at 44.

¹⁹ Foley, *supra* note 16 (manuscript at 11–12).

²⁰ Jeff Nilsson, *Teddy Roosevelt and World War I: An Alternative History*, SATURDAY EVENING POST (Apr. 17, 2014), <http://www.saturdayeveningpost.com/2014/04/17/uncategorized/roosevelt-1912.html> [<https://perma.cc/3VHD-M2QY>].

²¹ See CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 221 (2003).

Europe that might have avoided the rise of Nazism.²² Who knows? The point suffices that America's method of electing its President had potentially profound consequences for the course of the world as well as American history.

We can make this same point about the 2000 election. Even setting aside the problem of hanging chads,²³ there is the matter of Ralph Nader. If America had a runoff system for its presidential election, such that voters nationwide were given the head-to-head choice between Bush and Gore, there is little doubt that Gore would have prevailed. In fact, Gore finished ahead of Bush in the national popular vote; Nader's role in affecting the outcome of the election was in Florida, where Gore almost certainly would have beaten Bush if just the two of them had been on the ballot in the state.²⁴ We can never know what would have transpired if Gore rather than Bush had occupied the Oval Office from 2001 to 2005, but we can be confident that history would have unfolded at least somewhat differently. Thus, as at the outset of the twentieth-century, so too at the start of the twenty-first, America's method of presidential elections has potentially momentous consequences for the entire flow of world events.

III. FRANCE'S ELECTORAL SYSTEM

France is among many nations that use a runoff for its presidential election, or what they call its two-round system.²⁵ The winner of the runoff is not always the leader after the first round. In 1974, 1981, and 1995, the second place finisher after the first round was the one to win the runoff. In '74, for example, Francois Mitterand led after the first round, but Valéry Giscard d'Estaing prevailed in the runoff.²⁶ In '81, it was the exact opposite situation.²⁷ In '95, Lionel Jospin led after the first round, but Jacques Chirac won in the May runoff election.²⁸ But in these three cases, the system guaranteed—as it was designed to do—that the winner of the presidency commanded support from the majority of the electorate.

America should at least consider whether France has a better system of electing its President than we do. I make this point not to settle the question, but rather to open discussion. The question, as I see it, is the extent to which America has an electoral system well-tailored to providing electoral outcomes

²² John Milton Cooper, Jr., *Whose League of Nations? Theodore Roosevelt, Woodrow Wilson, and World Order*, in *ARTISTS OF POWER* 163, 178 (William N. Tilchin & Charles E. Neu eds., 2006).

²³ See generally *Bush v. Gore*, 531 U.S. 98 (2000).

²⁴ Foley, *supra* note 16 (manuscript at 13–14).

²⁵ *Two-Round System*, ELECTORAL REFORM SOC'Y, <http://www.electoral-reform.org.uk/two-round-system> [https://perma.cc/PAZ5-B87T].

²⁶ *POLITICAL HANDBOOK OF THE WORLD* 2014, at 483 (Tom Lansford ed., 2014).

²⁷ *Id.*

²⁸ *Id.*

that match the electoral preferences of the eligible voters. To invoke Nick Stephanopolous's work, of which I am very much a fan, the question is the extent to which America's electoral system produces an alignment, rather than a misalignment, between what voters want and what voters get.²⁹

IV. CONCLUSION

We can ask that question across multiple domains of America's electoral system, with respect to congressional elections, state and local elections, and so forth. We can also ask whether particular features of America's electoral system contribute to alignment or misalignment: features like campaign finance rules, redistricting rules, and voter registration rules—the things we are going to be talking about today. We can inquire whether the degree of alignment or misalignment has increased or decreased over time. I am sure that we will explore these many matters as part of today's Symposium. Indeed, this Symposium is not about presidential elections specifically, but about election law much more broadly, and it's not just about the changes we might like to see to election procedures in the future, but how our nation's past has shaped the trajectory of what is feasible in terms of changes that might occur.

From my own perspective, I do hope that as our Symposium explores these broader topics, we keep in mind the particular question of whether the system for electing the President produces alignment or misalignment. This question deserves particular attention because, as I have indicated, the consequences of misalignment in this domain are so especially profound. When we ask whether America's eligible voters are getting the electoral results that they want, there is no more pressing question than whether the occupant of the Oval Office is the person the American electorate most wanted to put there.

²⁹ See generally Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283 (2014).